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No. 90-1390

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In The

Supreme Court of the United States

October Term, 1991

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, ET AL.,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, ET AL.,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF OF *AMICI CURIAE* CITIZENS INSURANCE COMPANY OF AMERICA, MICHIGAN MUTUAL INSURANCE COMPANY, MICHIGAN ASSOCIATION OF INSURANCE COMPANIES, ALLIANCE OF AMERICAN INSURERS AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF GENERAL MOTORS CORPORATION AND FORD MOTOR COMPANY AND URGING REVERSAL OF THE MICHIGAN SUPREME COURT

DONALD S. YOUNG
Counsel of Record
Dykema Gossett
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6560
Attorney for *Amici Curiae*
Of Counsel
KATHLEEN MCCREE LEWIS
RONALD J. TORBERT
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the 1987 amendment to the Michigan Worker's Disability Compensation Act, which retroactively imposes on insurers liability for the payment of additional worker's compensation benefits on behalf of their insureds long after the insurers fully had discharged their policy obligations under applicable law, violate the Contract Clause (art. I, § 10) of the United States Constitution?

2. Does the 1987 Michigan statute retroactively imposing on insurers liability for the payment of additional worker's compensation benefits on behalf of their insureds after the insurers fully had discharged their policy obligations under applicable law, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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Amici Curiae Citizens Insurance Company of America, Michigan Mutual Insurance Company, Michigan Association of Insurance Companies, Alliance of American Insurers and American Insurance Association (collectively "*Amici Curiae*" or "*Amici*") submit this Brief in Support of General Motors Corporation and Ford Motor Company and urge this Court to reverse the decision of the Michigan Supreme Court in this case.[1]

INTEREST OF THE *AMICI CURIAE*[2]

The Amici Curiae Or Their Members Provide Workers Compensation Insurance In Michigan.

Amici Curiae Citizens Insurance Company of America ("Citizens") and Michigan Mutual Insurance Company ("Michigan Mutual") are insurers providing, *inter alia*, worker's compensation and employer's liability insurance to employers in Michigan that are required by law to secure the payment of benefits to their employees who are injured on the job. Citizens and Michigan Mutual are directly affected by the Michigan legislature's 1987 amendment to § 354 of the Worker's Disability Compensation Act, Mich. Comp. Laws Ann. § 418.354 (West 1990), which retroactively imposed liability on Citizens and Michigan Mutual for the payment of additional worker's compensation benefits on behalf of their insureds years

[1] *Romein v. General Motors Corp.*, 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990).

[2] *Amici* have filed with the Court Clerk Petitioners' and Respondents' written consents to the filing of this Brief.

after these insurers had fully discharged their contractual duties to the insureds.[3] If this Court affirms the Michigan Supreme Court's decision finding the 1987 amendment constitutional, Citizens and Michigan Mutual will be required to expend between them approximately $2.3 million to satisfy their newly created obligation to pay additional worker's compensation benefits on behalf of past and present insureds.

Amici Curiae Michigan Association of Insurance Companies ("MAIC"), Alliance of American Insurers ("AAI") and American Insurance Association ("AIA") are insurance industry trade organizations whose members include insurers that sell, among other lines of insurance, worker's compensation and employer's liability coverages in Michigan. The MAIC was organized in 1971 and the AAI was organized in 1922. The AIA has existed in its present form since 1964, although its roots reach as far back as 1866 with the founding of the National Board of Fire Underwriters, and 1926 with the founding of the Association of Casualty and Surety Companies. Each of these organizations was formed to promote the interests of its member insurers and to achieve this objective by

---

[3] The 1987 amendment, effective May 14, 1987, eliminated an offset provision in the worker's compensation act enacted in 1981 and in effect since March 31, 1982. The 1981 act permitted insurers and self-insured employers to coordinate worker's compensation benefits received by employees injured prior to January 1, 1982 with social security and other pension benefits these workers received. Additionally, the 1987 statute required insurers and employers to reopen claims that were paid between March 31, 1982 and May 14, 1987 to workers injured before 1982 and to pay workers, with interest, amounts coordinated pursuant to the 1981 statute.

representing the members in litigation and before legislative bodies, and by providing research and public information. Members of these organizations are directly affected, in the same manner as Citizens and Michigan Mutual, by the 1987 amendment to § 354 and by the state supreme court's decision in *Romein v. General Motors Corp.*, 436 Mich. 515, 462 N.W.2d 555, *reh'g denied*, 437 Mich. 1202 (1990).

The Contract Clause and Due Process Clause arguments raised by General Motors Corporation and Ford Motor Company apply with equal force to insurers like Citizens, Michigan Mutual and the members of MAIC, AAI and AIA. Michigan worker's compensation insurers fully satisfied their express contractual obligations to their insureds during the period from March 31, 1982 (the date insurers first were allowed to coordinate worker's compensation benefits with other retirement benefits) through May 14, 1987 (the effective date of the 1987 amendment requiring insurers to pay additional benefits, retroactive to March 31, 1982, to workers injured before that date). The Michigan legislature's attempt to impose greater liabilities on insurers than they assumed and discharged under their contracts during the relevant period works a direct and unconstitutional impairment of insurers' settled contract rights. Moreover, the 1987 statute deprives insurers of due process by impermissibly disturbing settled expectations and long-completed transactions.

The Michigan Supreme Court's express approval of the state's retroactive creation of new liabilities for insurers under completed insurance policy contracts has exacerbated the inherently uncertain process of fairly

pricing insurance. This is so because the benefit levels payable under Michigan's worker's compensation law form a key component of an insurer's costs not only for worker's compensation insurance, but for other state-mandated coverages like automobile liability and automobile no-fault, and because insurers are permitted to price their policies utilizing only their projected future costs, but not past or retroactively-imposed costs. The added measure of uncertainty created by the Michigan court's decision allowing the legislature *retroactively* to change these benefit levels at its whim will make it substantially more difficult, if not impossible, for insurers to make accurate decisions regarding the fair pricing of their product. As a result, Citizens, Michigan Mutual and other insurers writing worker's compensation and other required coverages in Michigan may cease providing this protection and find other sources for their surplus.

The Pricing Of Worker's Compensation Insurance In Michigan Is Prospective Only.

Because Michigan's economy has been so heavily industrialized for most of this century, worker's compensation has become, both economically and socially, the most important of all lines of insurance in the state. Ever since the first comprehensive worker's compensation act was adopted in the state in 1912, Michigan workers and their dependents have been entitled by statute to the immediate payment of a statutorily-guaranteed level of wage loss, survivors' loss and medical benefits for injuries and deaths arising out of and in the course of their employment. Moreover, claims that arise under the worker's disability compensation system in Michigan are

not subject to many of the common law defenses – like comparative or contributory negligence and assumption of the risk – which, until adoption of no-fault worker's compensation laws in the state, prevented many injured workers from receiving any benefits for wage loss, survivors' loss and medical expenses resulting from on-the-job injuries.

Employers that are subject to the Michigan Worker's Disability Compensation Act are required by law to secure for all of their employees the payment of these statutorily-granted benefits. Mich. Comp. Laws Ann. § 418.611 (West 1990). Some very large employers like the Petitioners herein secure their obligation to pay worker's compensation benefits to their employees by becoming authorized self-insurers. All other employers, however, must secure this obligation by purchasing policies of insurance from companies which agree, and are authorized by the state, to write this line of business in Michigan. *Ibid*. Because Michigan employers are required by law to purchase worker's compensation insurance (except for those few employers who are granted the privilege of self-insuring), insurers who write this business in the state are required to insure every employer seeking such coverage. They may do so either by contracting directly and voluntarily with the employer, or by providing coverage through the Michigan Worker's Compensation Placement Facility. The Facility is a statutorily-created assigned risk pool, an insurer of last resort in which each insurer authorized to write worker's compensation insurance in Michigan must participate as a condition of its authority to transact such insurance in the state. Mich. Comp. Laws Ann. § 500.2301 (West 1983).

Insurance is one of only a few products of which the seller's actual cost is unknown when the product is sold. When a worker's compensation insurer issues a policy to cover losses in a future period and charges a premium therefor, that insurer merely is estimating the dollar amount of its ultimate *future* obligation to pay (1) claims arising under the policy, (2) claims-related expenses, (3) overhead and (4) other underwriting expenses. Thus, with the exception of a small minority of policies which are retrospectively-rated,[4] insurance premiums are prospective only. An insurer does not – indeed, *cannot* – attempt to recover losses and expenses for a prior period through the premium it charges for a policy which has been issued to cover a future period. Once an insurer incurs a loss that is covered by the policy, or incurs a policy-related expense, if the premium charged for the policy is inadequate to cover the loss or expense, the insurer cannot recoup that loss through future premiums. Michigan Insurance Bureau Casualty Insurance Rate Rules 5(1), 6(1) & 7(1), Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1)(1980). It is, therefore, critical to the fair pricing of worker's compensation and other

[4] With a retrospectively-rated policy, the insurer and insured agree that the policy premium will be determined after the close of the policy period on the basis of actual loss data. Even then, however, once the policy premium is determined, it cannot later by re-determined because of a retroactive change in the insurer's costs. Retrospectively-rated policies comprised only 1.06% of all worker's compensation policies sold in Michigan in 1988, the latest full year for which such data are available from the Michigan Insurance Bureau.

insurance that insurers have a stable basis from which to estimate the costs of paying claims and expenses under the coverage provided.

The claims cost component of insurance pricing (that is, the insurer's cost to pay covered claims and claims-related expenses) is comprised of three factors: claim frequency (the number of claims occurring during a given policy period), claim severity (the type of injury suffered, e.g., a back injury or loss of the industrial use of a limb) and the level of benefits which the insurer must pay for a covered claim. Claim frequency and claim severity are, of course, impossible for either the insurer or the insured to know in advance of the time period covered by the insurance policy. Only long after the policy period has ended can the contracting parties know how many claims occurred and how severe those claims are.

As a result, insurers estimate future claim frequency and severity by examining historical claims data and attempting to project future costs from the historical information. Making this task more difficult is the fact that claim frequency and severity can vary from year to year, sometimes dramatically. The process of estimating frequency and severity for future periods is, at best, inexact.

With respect to state-mandated insurance coverages like worker's compensation, automobile liability and automobile no-fault, the third element of claim costs – the level of benefits which a claimant may recover – is (or at least it should be) relatively more stable than the first two elements because the benefit level is set by law. *Amici Curiae* do not contest the state's power *prospectively* to

change and therefore affect future benefit levels. Because insurance premiums are charged prospectively, a forward-looking change in benefit levels would not materially affect insurers' ability to price coverages fairly. Insurers and insureds still could estimate the third element of future insurance claim costs with a greater degree of accuracy and certainty than they could estimate the first two elements.

Where, however, the state may *retroactively* increase (or decrease) insurers' liability by effecting changes in benefit levels for policy periods long-since closed, the already uncertain process of projecting future costs is made even more uncertain. The sole element of claim cost that remained relatively stable – benefit levels – no longer would be available to Petitioners, or as a means of allowing insurers to price their product fairly to themselves and their insureds.

SUMMARY OF ARGUMENT

Just as surely as the Michigan legislature's 1987 amendment to § 354 of the worker's compensation law impairs Petitioners' contractual relationships with their employees, this amendment also directly and substantially impairs the express contracts of worker's compensation insurers and their insureds. Moreover, this severe contractual impairment is not necessary to correct a general social problem. To the contrary, the contractual impairment accomplished through the 1987 statute benefits only a discrete class of persons, and does so through means which are not necessary to achieve the legislature's stated objectives.

The 1987 amendment to § 354 violates the Due Process Clause because it completely lacks substantial fairness with respect to the settled expectations of worker's compensation insurers. Insurers were entitled to and did reasonably rely, in the ordering of their business affairs, on the satisfaction of their policy obligations to their insureds under existing law. The state should not be allowed to thwart that reasonable reliance by imposing in 1987 *five years* of retroactive liability for contractual obligations which already had been satisfied, merely because the legislature believes that workers injured before March 31, 1982 should receive as much in worker's compensation benefits as persons injured after that date. The impact of the Michigan Supreme Court's decision on insurers' reasonable expectations, and on the inherent uncertainty in the prospective pricing of worker's compensation and other lines of insurance, could drive insurers out of the Michigan insurance market. The resultant lack of insurance, and the higher premiums charged for what coverage would be available, would cause substantial hardships throughout the state and national economies.

ARGUMENT

I. THE CONTRACT CLAUSE BARS THE MICHIGAN LEGISLATURE FROM RETROACTIVELY IMPOSING ON INSURERS ADDITIONAL LIABILITIES TO THEIR INSUREDS LONG AFTER THE INSURERS FULLY HAD DISCHARGED THEIR CONTRACTUAL OBLIGATIONS UNDER EXISTING LAW.

There can be no doubt that the 1987 amendment to Michigan's worker's compensation statute impairs

express contract rights and obligations that are entitled to protection under the Contract Clause of the United States Constitution. The Michigan legislature, with the blessing of the state Supreme Court, effectively has *reopened* claims arising under executed worker's compensation insurance policy contracts, which claims were discharged pursuant to the unambiguous language of the policies themselves and existing law. The Michigan Supreme Court clearly misapplied this Court's Contract Clause decisions in finding that the 1987 amendment to § 354 is constitutional.

A. Express Contractual Rights Of Insurers Under Michigan Worker's Compensation Policies Are Protected By The Contract Clause.

Most, if not all, worker's compensation insurance policies issued in Michigan – including those issued by Citizens, Michigan Mutual and members of the MAIC, AAI and AIA who write worker's compensation insurance in the state – contain the following standard policy language:[5]

> WORKERS COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE POLICY
>
> In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows.
>
> * * *

[5] A copy of Michigan Mutual's worker's compensation policy, containing the standard policy language, appears in the Appendix to this Brief.

> Part One – Workers Compensation Insurance
>
> * * *
>
> B. We Will Pay
>
> We will pay promptly when due the benefits required of you by the workers compensation law.

"Workers compensation law" is defined in the standard policy language as

> the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy period.

Amici and other insurers who paid coordinated worker's compensation benefits in Michigan on behalf of their insureds from March 31, 1982 through May 14, 1987 have satisfied their obligations under this express policy language. The Insurers promptly paid worker's compensation benefits on behalf of their insureds as those payment came due. Moreover, those payments properly were coordinated under the state's worker's compensation law, as that law had been interpreted by the Michigan Supreme Court in *Chambers v. General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985). Thus, as the insurers made these payments, they fully satisfied their express contractual duty to "pay promptly when due the benefits required of [their insureds] by the workers compensation law," which law included "amendments which [were] in effect during the policy period."

It is beyond peradventure that the express promises contained in the insurance policy contracts under which worker's compensation insurers paid benefits from

March 31, 1982 through May 14, 1987 fall within the class of "contracts, executed or executory, whether between individuals or the state and others" which the Contract Clause of the United States Constitution protects from impairment by the state. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823). As *Amici Curiae* discuss below, the 1987 amendment to § 354 impermissibly impairs those protected contractual rights.

B. The Impairment Of Insurers' Express Contracts With Their Insureds Violates The Contract Clause.

The Michigan Supreme Court's erroneous finding that § 354 is constitutional under the Contract Clause is the result of the court's misapplication of the three-part test which this Court recently has applied to legislation challenged under the Contract Clause. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983). This Court, properly applying the *Energy Reserves Group* test, should reverse the state court's decision because the 1987 amendment substantially and impermissibly impairs express contractual obligations between worker's compensation insurers and their insureds.

1. The 1987 statute substantially impairs contract rights.

The "threshold inquiry" under the three-part *Energy Reserves Group* test (459 U.S. at 411) is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v.*

Spannaus, 438 U.S. 234, 244 (1978). The *Spannaus* Court held:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245.

Common sense and the plain language of the standard worker's compensation policy compel the conclusion that the 1987 amendment substantially impairs insurers' policy contracts with their insureds. An insurer which issued a policy with the standard language agreed to "pay promptly when due the benefits required . . . by the worker's compensation law," which law included "amendments . . . in effect during the policy period." Pursuant to that agreement, the insurer which paid the required benefits and coordinated them as required by § 354 during the March, 1982 through May, 1987 period fully satisfied its obligation under the policy. The 1987 amendment to § 354, however, essentially rewrote the completed policy contract by expanding the insurer's

liability far beyond that which had been agreed to by the insurer and insured.

Just as the Minnesota statue which this Court struck down in *Spannaus* "substantially altered" the petitioner's contractual relationship with its employees "by superimposing obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake" (438 U.S. at 240), the 1987 amendment to § 354 materially changed the nature of the relationship which existed when insurers entered contracts with their insureds and later discharged their obligations thereunder. Where insurers had satisfied their liabilities to their insureds between March 31, 1982 and May 14, 1987, Michigan's legislature retroactively changed those liabilities and thereby altered fundamentally the contractual duties that insurers had undertaken and met.

The Michigan Supreme Court believed that there is no substantial impairment in this case because the 1987 statute does not eliminate the "basic benefit" *to employers* of the worker's compensation scheme – immunity from tort suits. 436 Mich. at 534. Manifestly, this argument is not applicable to the express contractual relationship between a worker's compensation insurer and its insured. That relationship is governed solely by the terms of the policy contract itself and the worker's compensation law in effect when the policy's obligations are met. Clearly, the 1987 Michigan statute leaves nothing of the benefit for which the insurer contracted with its insured.

The worker's compensation insurer should be able to find comfort in the stability that results from having fully discharged, consistent with then-existing law, the policy

obligations for which it collected premiums from its insured. As a result of the 1987 statute and the Michigan Supreme Court's decision, however, the insurer now finds that the express provisions of its policy contract mean nothing because the state, years after the policy obligations lawfully were met, may retroactively change those provisions and impose *additional* liabilities under the executed contract. The 1987 amendment to § 354 has imposed a liability on worker's compensation insurers that was totally unexpected when the policy contracts were in effect, premiums were collected and claims were paid and discharged under prior law. More important, this additional obligation expressly never was agreed to by *either* the insurer or the insured. Both parties to the insurance contract had settled expectations of finality when payments were made thereunder. The Michigan legislature upset those expectations, thus working a severe impairment of the parties' contractual relationship.

2. The Michigan court misapplied this Court's holdings on the "legitimate purpose" and "reasonable means" requirements in Contract Clause cases.

The Michigan Supreme Court engaged in only minimal scrutiny of amended § 354. After deciding that "[t]here is a significant state interest in protecting the rights of disabled employees to receive the full compensation intended by the Legislature . . . " (436 Mich. at 535), the court found amended § 354 valid because the state "could have reasonably found that the coordination of benefits caused hardship among the employees whose

injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 536.[6] Although it conceded that the means chosen by the state to achieve its objectives involved the retroactive imposition of additional liabilities under completed transactions, the court found these means "reasonable" because "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Ibid.*

Such a low level of scrutiny plainly is insufficient under this Court's decisions. Because the impairment of insurers' contracts which the amendment to § 354 creates is nothing short of "severe," the statute must be subjected to the "careful examination of [its] nature and purpose" which this Court required in *Spannaus*. 438 U.S. at 245. It is not enough that the 1987 statute is shown to satisfy the more deferential "rational relationship" standard that is applied to minimal intrusions into contractual relationships. Rather, amended § 354 cannot stand unless it is "necessary to meet an important general social problem." *Id.* at 247. The 1987 amendment does not even come close to satisfying this standard.

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[6] The legislature did, however, create in 1980 a state-funded weekly compensation supplement for persons who were injured between September 1, 1965 and December 31, 1979. Mich. Comp. Laws Ann. § 418.352 (West 1990). This state-funded supplement entitles eligible employees to receive up to the same weekly compensation as persons injured after January 1, 1982. Mich. Comp. Laws Ann. § 418.352(6) (West 1990).

First, it is doubtful that the 1987 statute actually was intended to address "an important general social problem." Instead, the plain language of the amendment suggests that like the Minnesota statute challenged in *Spannaus*, the amendment to § 354 "has an extremely narrow focus" (*Id.* at 248), benefitting only that class of persons whose receipt of duplicative benefits prior to 1982 prompted the legislature to require coordination of benefits in the first place. "Thus, this law can hardly be characterized . . . as one enacted to protect a broad societal interest rather than a narrow class." *Id.* at 248-249.

Second, even assuming that the legislature had a legitimate interest in preserving worker's compensation benefits for employees injured before 1982, it flatly cannot be said that the 1987 statute's retroactive imposition of liability on insurers – and the accompanying destruction of their completed contracts – was necessary to promote that interest. The 1987 amendment to § 354 did not benefit all employees injured prior to 1982. Instead, the statute expressly benefits persons with pre-1982 injuries *only* if they had access to duplicative benefits provided under the worker's compensation law and other retirement plans. If the Michigan legislature had wanted in 1987 to protect benefit levels for all employees injured prior to 1982, it rationally – and constitutionally – could have done so by making persons injured between January 1, 1980 and December 31, 1981 eligible for the weekly compensation supplement provided under § 352.[7] It would not, under those circumstances, have been necessary to impair insurers' contracts with their insureds.

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[7] *See* note 6 *supra*.

Indeed, the Michigan Supreme Court's assertion that the 1987 statute is reasonable because it "imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute" (436 Mich. at 536) asks and answers the wrong question. Under this Court's Contract Clause cases, the proper inquiry is *not* what degree of retroactive liability is necessary to achieve the state's objectives, but instead whether *any* retroactive undoing of completed contracts is necessary. Here, the Michigan legislature rationally could have achieved its objectives by means other than upsetting already completed transactions. The 1987 statute cannot, therefore, pass constitutional muster.

II. THE 1987 LEGISLATION VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IMPERMISSIBLY DISTURBS THE SETTLED EXPECTATIONS OF THE PARTIES TO WORKER'S COMPENSATION INSURANCE CONTRACTS AND IS MANIFESTLY UNFAIR TO INSURERS.

Petitioners' Due Process Clause challenge to amended § 354 is equally applicable to *Amici's* unique interest in the protection of their vested contractual rights. Simply stated, the Michigan legislature's 1987 worker's compensation amendment unraveled completed transactions between worker's compensation insurers and their insureds and upset the settled expectations of the parties to the insurance policy contracts. This state action completely lacks substantive fairness and this Court should strike it down.

Just as surely as the Michigan Supreme Court allowed the state legislature retroactively to *increase* benefit levels for worker's compensation recipients who were injured before March 31, 1982, its decision would permit the state to impose retroactive *decreases* in benefit levels and require injured workers to reimburse employers and their insurers for "overpayments" made many years earlier. It is manifestly unfair, under either circumstance, to permit the state to upset insurers' expectations regarding the cost of insurance for periods long-since closed.

If the Michigan court's decision is allowed to stand, the resulting hardship on insurers, insureds and ultimately, Michigan workers could be enormous. This result flows directly from the inherently uncertain nature of insurance pricing. Most business entities can recover unexpected losses attributable to past periods by building the losses into the price of products which they sell in the future. An insurer, however, cannot recoup through the price of its insurance policy – which is issued to cover claims occurring during a future period – losses which arose in past policy periods. Petitioners, of course, suffer a similar impact on their ability to predict future costs.

If benefit levels for state-mandated coverages like worker's compensation can retroactively be changed – upward or downward – at the state's whim, there will be no stability in the pricing of worker's compensation insurance and thus no basis for insurers to estimate accurately the future cost of providing protection to their insureds. As a result of the Michigan court's decision herein, an insurer pricing a worker's compensation policy to be issued in 1991, based on benefit levels set by law for claims paid in 1991, will have no assurance that in the

year 2001 the state will not retroactively impose additional liabilities for claims paid under the 1991 policy.

If worker's compensation insurers cannot price their product with any reasonable degree of confidence that they can recover even their actual cost of providing the product – much less recover a reasonable return for providing the coverage – they may simply cease writing that insurance and look to other sources in which to invest their surplus. The potential adverse impact on the availability of this line of insurance in Michigan is both obvious and substantial.

Worker's compensation is not the only line of insurance which could be affected adversely by the unfairness of the Michigan legislature's 1987 act. For any insurance coverage in which benefit levels are established by the state – which, in Michigan, includes no-fault automobile insurance[8] – the state's power to effect a retroactive alteration of liabilities by changing benefit levels for past periods removes the one source of stability contributing to the fair pricing of the insurance product. Insurers who do not feel confident that they will be able to recover their future costs, regardless of the premium they charge, may cease writing these lines of business in the state, making such coverage less available for consumers, and then available only at significantly higher premiums.

Even if insurers do not actually cease writing state-mandated coverages as a result of the uncertainty caused by the indiscriminate retroactive use of the legislative

[8] Mich. Comp. Laws Ann. § 500.3101 – § 500.3179 (West 1990).

power, the increased prices insurers are likely to charge for their policies to cover this uncertainty would work a significant hardship on insureds.[9] The ripple effect of this uncertainty through Michigan's and the nation's economies could be quite substantial.

The manifest unfairness of the 1987 amendment becomes plainly apparent when the Court considers insurers' substantial and perfectly reasonable reliance on (1) the March 31, 1982 act which permitted coordination of worker's compensation benefits with other retirement benefits and (2) the Michigan Supreme Court's authoritative interpretation of that act in the *Chambers* case. Insurers paid worker's compensation claims *as required by the plain language of their policies and existing law.* They were entitled to believe that they fully had satisfied their obligations to their insureds, and to rely on this belief in conducting their subsequent business affairs. The state should not be permitted to upset insurers' reasonable reliance on existing law and their contracts through the retroactive imposition of new liabilities.

[9] Michigan law permits insurers to consider uncertainty in developing rates. Mich. Admin. Code r. 500.1205(1), 500.1206(1) & 500.1207(1) (1980), which implement § 2403 of the Michigan Insurance Code, Mich. Comp. Laws Ann. § 500.2403 (West 1990).

CONCLUSION

For the foregoing reasons, this Court should find that § 354 of the Michigan Worker's Disability Compensation Act, as amended in 1987, is unconstitutional, and reverse the decision of the Michigan Supreme Court in this case.

Respectfully submitted,

DONALD S. YOUNG
Counsel of Record
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6560

Attorney for Citizens Insurance Company of America, Michigan Mutual Insurance Company, Michigan Association of Insurance Companies, Alliance of American Insurers and American Insurance Association

Of Counsel
KATHLEEN MCCREE LEWIS
RONALD J. TORBERT
DYKEMA GOSSETT
35th Floor
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6500

APPENDIX

WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY

Amerisure™
Insurance Company

DETROIT, MICHIGAN

(A stock insurance company)

In return for the payment of the premium and subject to all terms of this policy, we agree with you as follows.

GENERAL SECTION

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

B. Who Is Insured

You are insured if you are an employer named in item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

C. Workers Compensation Law

Workers Compensation Law means the workers or workmen's compensation law and occupational disease law of each state or territory named in item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy

period. It does not include the provisions of any law that provide nonoccupational disability benefits.

D. **State**

State means any state of the United States of America, and the District of Columbia.

E. **Locations**

This policy covers all of your workplaces listed in items 1 or 4 of the Information Page; and it covers all other workplaces in item 3.A. states unless you have other insurance or are self-insured for such workplaces.

PART ONE – WORKERS COMPENSATION INSURANCE

A. **How This Insurance Applies**

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.

2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

B. **We Will Pay**

We will pay promptly when due the benefits required of you by the workers compensation law.

C. **We Will Defend**

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

D. **We Will Also Pay**

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request, but not loss of earnings;

2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;

3. litigation costs taxed against you;

4. interest on a judgment as required by law until we offer the amount due under this insurance; and

5. expenses we incur.

E. **Other Insurance**

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

F. **Payments You Must Make**

You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:

1. of your serious and willful misconduct;
2. you knowingly employ an employee in violation of law;
3. you fail to comply with a health or safety law or regulation; or
4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.

If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly.

G. **Recovery From Others**

We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.

H. **Statutory Provisions**

These statements apply where they are required by law.

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an

agency authorized by law. Enforcement may be against us or against you and us.

4. Jurisdiction over you is jurisdiction over us for purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with that law.
5. This insurance conforms to the parts of the workers compensation law that apply to:
   a. benefits payable by this insurance;
   b. special taxes, payments into security or other special funds, and assessments payable by us under that law.
6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

Nothing in these paragraphs relieves you of your duties under this policy.

PART TWO – EMPLOYERS LIABILITY INSURANCE

A. **How This Insurance Applies**

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
2. The employment must be necessary or incidental to your work in a state or territory listed in item 3.A. of the Information Page.
3. Bodily injury by accident must occur during the policy period.

4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.

B. **We Will Pay**

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;

2. for care and loss of services; and

3. for consequential bodily injury to a spouse, child, parent, brother of sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

C. **Exclusions**

This insurance does not cover:

1. liability assured under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;

2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;

3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;

4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;

5. bodily injury intentionally caused or aggravated by you;

6. bodily injury occuring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;

7. damages arising out of the discharge of, coercion of, or discrimination against any employee in violation of law.

D. **We Will Defend**

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

E. **We Will Also Pay**

We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding or suit we defend:

1. reasonable expenses incurred at our request; but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we offer the amount due under this insurance; and
5. expenses we incur.

F. **Other Insurance**

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

G. **Limits of Liability**

Our liability to pay for damages is limited. Our limits of liability are shown in item 3.B. of the Information Page. They apply as explained below.

1. Body Injury by Accident. The limit shown for "bodily injury by accident-each accident" is the most we will pay for all damages covered by this insurance because of bodily injury to one or more employees in any one accident. A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease-policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease-each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.

   Bodily injury by disease does not include disease that results directly from a bodily injury by accident.

3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.

H. **Recovery From Others**

We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.

I. **Actions Against Us**

There will be no right of action against us under this insurance unless:

1. You have complied with all the terms of this policy; and

2. The amount you owe has been determined with our consent or by actual trial and final judgment.

This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability.

PART THREE – OTHER STATES INSURANCE

A. **How This Insurance Applies**

1. This other states insurance applies only if one or more states are shown in item 3.C. of the Information Page.
2. If you begin work in any one of those sates and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in item 3.A. of the Information Page.
3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.

B. **Notice**

Tell us at once if you begin work in any state listed in item 3.C. of the Information Page.

PART FOUR – YOUR DUTIES IF INJURY OCCURS

Tell us at once if injury occurs that may be covered by this pc licy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.

4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE – PREMIUM

A. **Our Manuals**

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. **Classifications**

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. **Remuneration**

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and

2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. **Premium Payments**

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. **Final Premium**

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classification and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise.

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.

2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate

cancellation table and procedure. Final premium will not be less than the minimum premium.

F. **Records**

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. **Audit**

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

PART SIX – CONDITIONS

A. **Inspection**

We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.

B. **Long Term Policy**

If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.

C. **Transfer of Your Rights and Duties**

Your rights or duties under this policy may not be transferred without our written consent.

If you die and we receive notice within thirty days after your death, we will cover your legal rerpresentative as insured.

D. **Cancellation**

1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.
2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in item 1 of the Information Page will be sufficient to prove notice.
3. The policy period will end on the day and hour stated in the cancellation notice.
4. Any of these provisions that conflicts with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with that law.

E. **Sole Representative**

The insured first named in item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancellation.

The policyholder shall participate, to the extent and upon the conditions fixed and determined by the board of directors of the Company in accordance with the provisions of law, in the distribution of any unabsorbed premiums, savings or dividends as may from time to time be so fixed and determined.

IN WITNESS WHEREOF, THE AMERISURE INSURANCE COMPANY has caused this policy to be signed by its president and secretary at Detroit, Michigan, and countersigned on the information page by a duly authorized representative of the company.

/s/ Roy A. Styles
Secretary

/s/ E. L. Cox
President